3-3-1976

Browning Manufacturing Division Emerson Electric Company and Liberty Mutual Insurance Company v. Frank E. Paulus and the Workmen's Compensation Board

Appellee's Brief 1975-SC-1117

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1117

BROWNING MANUFACTURING DIVISION EMERSON ELECTRIC COMPANY and LIBERTY MUTUAL INSURANCE COMPANY - - - - - - - - Appellants

Versus

FRANK E. PAULUS and the WORKMEN'S COMPENSATION BOARD - - - - - - - - - Appellees

APPEAL FROM THE MASON CIRCUIT COURT
HON. RICHARD L. HINTON, JUDGE

BRIEF FOR APPELLEE, FRANK E. PAULUS

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I hereby certify that a copy of this Brief has been served upon Appellants herein by mailing same to their attorneys of record Hon. Kirk Clarke, 119 Sutton Street, Maysville, Kentucky 41056 and Hon. Robert G. Hunt, King, Deep and Branaman, Ohio Valley National Bank Building, Henderson, Kentucky 42420; upon the Workmen's Compensation Board by mailing a copy thereof to its Director, Hon. William L. Huffman, Department of Labor, Workmen's Compensation Board, Frankfort, Kentucky 40601.

I further certify that a copy has been served upon the trial judge, Judge Richard L. Hinton, Fleming County Courthouse, Flemingsburg, Kentucky 41041, this the ____ day of March, 1976, pursuant to RCA 1.250.

William C. Jacobs

WILLIAM C. JACOBS
Counsel for Appellee, Frank E. Paulus

ROBERTS PRINTING CO., FRANKFORT, KY.

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APPEAL FROM THE MASON CIRCUIT COURT
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BRIEF FOR APPELLEE, FRANK E. PAULUS

STATEMENT OF THE CASE

On April 1, 1971, the Appellee, Frank E. Paulus, (a/k/a Francis E. Paulus), sustained a traumatic, work-connected injury while employed by Appellant, Browning, by reason of which he was totally, permanently disabled. The parties were operating under the Kentucky Workmen's Compensation Act. Mr. Paulus notified Browning as soon as was practicable after he was injured, and thereafter made a proper and timely claim for compensation. Appellant, Liberty Mutual, Browning's compensation carrier, paid Mr. Paulus for seventy (70) weeks, voluntary temporary total disability payments (totaling $3,920.00).

On February 1, 1973, judgment of $40,050.00 was entered in a negligence action brought by Mr. Paulus against third persons (not here parties) in the U. S. District Court for the Eastern District of Illinois. (R.A., p. 35-21). That action grew out of the accident for which compensation is being sought in this case. (R.A., p. 35-16). Every fact stated above has been stipulated to by the parties. (R.A., pp. 35-15, et seq.).

Liberty Mutual was not a captioned party to that civil action, but had asserted a "Workmen's Compensation lien" claim therein. (R.A., p. 35-22). On February 1, 1973, Liberty Mutual "agreed to settle all claims for its Workmen's Compensation lien for the sum of $13,333.33." (R.A., p. 35-23). As of that date, Liberty Mutual had paid Mr. Paulus $3,920.00 in disability benefits, and had paid on his behalf $3,500.00 in chargeable medical payments. (Liberty Mutual voluntarily had made medical payments on behalf of Mr. Paulus in excess of the 1971 limit prescribed by KRS 342.020).

Since Mr. Paulus is asserting no claim for additional medical benefits, and since voluntary medical payments in excess of the statutory limit may not be off-set against *disability* benefits due, (See *Harlan Collieries Co. v. Johnson,* Ky., 212 SW2d 540, (1948), and cases cited therein), and since Liberty Mutual settled "*all* claims for its Workmen's Compensation lien for the sum of $13,333.33," the Appellants' discussion of the medical payments serves only to becloud the basic issue: Liberty Mutual has been indemnified by its settlement in the third party action for disability payments it has not yet paid Mr. Paulus.

Mr. Paulus, pro se, timely filed his Application for Adjustment of Claim with the Board on August 1, 1973. (R.A., p. 35-9). By agreement of the parties, the original hearing before the referee scheduled for October 8, 1973 was continued in anticipation that the matter could be settled. (R.A., p. 35-12, 13). The parties entered into a Stipulation (R.A., p. 35-15 through 35-27) which established every element necessary to sustain an award for a total, permanent disability under Kentucky's Workmen's Compensation Act. By uncontroverted affidavit, Mr. Paulus established that his earnings entitled him to the maximum benefits allowable. (R.A., p. 35-46).

There being no facts in dispute and Mr. Paulus' physical condition being such that travel is an extreme hardship to him, three motions to submit the claim *upon briefs* were made on his behalf: on November 5, 1974 (R.A., p. 35-49), overruled, November 18, 1974 (R.A., p. 35-71); on January 2, 1975 (R.A., p. 35-72), overruled, January 20, 1975 (R.A., p. 35-79); and on May 7, 1975 (R.A., p. 35-88), overruled, May 19, 1975 (R.A., p. 35-92). No hearing date before a hearing examiner was ever set by the Board after October 8, 1973. Each of Mr. Paulus' motions to submit were met by Appellants' Motions to Dismiss all of which were also, overruled until the Order of May 19, 1975, which sustained Appellants' Motion, without explanation. (R.A., p. 35-92).

Mr. Paulus, timely filed a Petition for Reconsideration under KRS 342.281 upon stated grounds,

among which was that the order dismissing did not state "findings of fact (and) rules of law" as required by KRS 342.275. (R.A., p. 35-94). On June 9, 1975, Mr. Paulus' Petition for Reconsideration was overruled. (R.A., p. 103).

On June 25, 1975, Mr. Paulus timely filed his Petition on Appeal in Mason Circuit Court under KRS 342.285 stating fully the grounds upon which review was sought, and assigning all errors relied on, (R.A., p. 1-7), and process was issued. (R.A., p. —).

On June 25, 1975, service of process was had on Browning, the Appellant-Employer in Mason County. (R.A., p. 8).

By agreement of the Mason Circuit Clerk and Counsel for Mr. Paulus, on June 25, 1975, a summons directed to the Fayette County Sheriff (for service upon the Director of the Workmen's Compensation Board, a resident of Fayette County) and a summons directed to the Franklin County Sheriff (for service upon the Commissioner of Insurance for the Appellant-Carrier, Liberty Mutual) were to be prepared by the Clerk, and mailed to Counsel for distribution to the appropriate sheriff. Promptly upon receipt of process, the same were forwarded to the appropriate sheriff, along with costs. (R.A., p. 36-38).

The Fayette County Sheriff received the summons for service on the Director, on July 2, 1975. (R.A., p. 10). The Franklin County Sheriff received and served process on the Commissioner of Insurance on July 3, 1975. (R.A., p. 12). A return of "not found" was made on July 2, 1975 by the Fayette County Sheriff and the same mailed to the Mason Circuit Clerk and received on Saturday, July 12,

1975. (R.A., p. 40). The Clerk, on Saturday, July 12, 1975, prepared a new summons, directed to the Franklin County Sheriff for service on the Director and mailed it to Counsel for Mr. Paulus. (R.A., p. 40). On Monday, July 14, 1975, service was had on the Director and the Franklin County Sheriff, so made his return. (R.A., p. 11).

The affidavit of the Mason Deputy Circuit Clerk (R.A., p. 25) is incomplete in that it does not reflect, as the record does, the return of "not found" by the Fayette County Sheriff and the issuance of the alias summons on Saturday, July 12, 1975, this latter summons being the one served on Monday, July 14, 1975. (R.A., p. 11).

The Board does not object to service of process, but formally entered its appearance and requested that the cause be remanded to it to correct its admitted error. (R.A., p. 41). Browning, the Appellant-Employer was served 5 days before the time expired within which a Petition on Appeal could have been filed (R.A., p. 8). Browning and its carrier, Liberty Mutual *served* their entries of appearance on July 3, 1975, (R.A., p. 14), the same day the Commissioner of Insurance was served.

Mr. Paulus has timely perfected his appeal and the trial court properly remanded the claim to the Board.

ARGUMENT

I.

WHERE THE BOARD DISMISSED EMPLOYEE'S CLAIM WITHOUT FILING "FINDINGS OF FACT, RULINGS OF LAW AND OTHER MATTERS PERTINENT TO THE QUESTION AT ISSUE" AS REQUIRED BY KRS 342.275 THE JUDGMENT OF THE CIRCUIT COURT REMANDING THE CAUSE TO THE BOARD FOR FURTHER PROCEEDINGS WITH RESPECT TO THE EXTENT AND DURATION OF THE EMPLOYEE'S DISABILITY, IF ANY, ENTITLEMENT TO BENEFITS, IF ANY, AND CREDITS AGAINST SUCH BENEFITS, IF ANY, IS NOT A FINAL OR APPEALABLE ORDER.

No less than 10 times this Court has held that an order remanding to the Workmen's Compensation Board is final and appealable where such order either divests an employee of an award made to him by the Board, or directs the Board to make an award to an employee, thereby divesting the employer of a vested right of non-liability on the employee's claim. *Searcy v. Three Point Coal Co.,* Ky., 134 SW2d 228 (1940); *Commonwealth, Dept. of Highways v. Giles,* Ky., 146 SW2d 37 (1941); *Inland Steel Co. v. Newsome,* Ky., 136 SW2d 1077 (1940); *Kenmont Coal Co. v. Clark,* Ky., 171 SW2d 242 (1943); *Mullins v. Ky. W. Va. Gas Co.,* Ky., 307 SW2d 169 (1958); *Tecon v. Oser,* Ky., 385 SW2d 55 (1964); *Brown Hotel Co. v. Roberts,* Ky., 365 SW2d 308 (1963); *Jewell Ridge Coal Co. v. McDowell,* Ky., 392 SW2d 59 (1965); *Pittsburg and Midway Coal Mining Co. v. Travelers Ins. Co.,* Ky., 456 SW2d 816 (1969); *Commonwealth, Department of Mental Health v. Robertson,* Ky., 447 SW2d 857 (1969).

It is well settled that an order of a trial court sustaining a motion for new trial is interlocutory and therefore, not appealable. *Cornett v. Wilder,* Ky., 307 SW2d 752 (1957). The successful party in a civil action is no less deprived of a vested right when a new trial is ordered than is an employee or an employer who, having been successful before the Board, finds himself or itself back before the Board by reason of an order remanding the claim. Part of the rationale for the holdings that an order granting a new trial is not appealable is: (1) the error, if any, in granting the new trial, may be reviewed on appeal after the case has been finally adjudicated at the trial court level; and (2) such a holding avoids a multiplicity of appeals. Such a rationale is no less applicable to orders remanding Workmen's Compensation claims to the Board. It is respectfully submitted that the rule of law that holds an order of remand to be final rather than interlocutory, being a judicial rather than a statutory rule, this court has the power, which it ought to exercise, to repudiate the holding in the above-cited cases and adopt the more rational and sensible rule as applies to orders sustaining motions for new trials.

There is a major distinction between the orders of remand in the above-cited 10 cases and the order of remand of the trial court, here. Here, the order of the Board merely dismissed Mr. Paulus' claim without explanation. (R.A., p. 35-92). KRS 342.275 provides in part:

> ". . . findings and conclusions sent parties . . . the award, order or decision *together with a statement of the findings of fact, rulings of law*

> *and any other matters pertinent to the question at issue* shall be filed with the record of proceedings and a copy of the award, order or decision shall immediately be sent to the parties in dispute." (Emphasis added).

The Board did not comply with the mandatory provision of KRS 342.275 above quoted, and such failure was a basis for Mr. Paulus' Petition for Reconsideration, (R.A., p. 35-93, 96), and was a stated ground in Mr. Paulus' Petition on Appeal. (R.A., p. 3).

In the case of *Green River Fuel Co. v. Sutton*, Ky., 84 SW2d 79 (1935), this court held that an order was not final, and hence, not appealable which remanded a Workmen's Compensation claim to the Board without passing on the merits, with a direction to make an award in compliance with the statute requiring findings of law and fact. Since the trial court here by its order of remand made no decision on the merits, and in fact could not have, since the order of the Board was silent as to its findings of fact and law as to why Mr. Paulus' claim was dismissed, the order of remand falls within the holding of the Sutton case, is interlocutory and therefore, not appealable.

II.

WHERE THE MAXIMUM DISABILITY BENEFIT ALLOWED THE EMPLOYEE IS $23,800.00 AND THE WORKMEN'S COMPENSATION INSURANCE CARRIER HAS PAID $3,920.00 IN DISABILITY BENEFITS TO THE EMPLOYEE BUT HAS RECEIVED $13,333.33 OF THE EMPLOYEE'S JUDGMENT IN A THIRD PARTY ACTION IN SETTLEMENT OF "ALL CLAIMS FOR ITS WORKMEN'S COMPENSATION LIEN," THE CARRIER IS INDEBTED TO THE EMPLOYEE FOR THE DIFFERENCE BETWEEN $23,800.00 AND $3,920.00.

In stating this issue, reference to medical payments made by Liberty Mutual on behalf of Mr. Paulus has been omitted. Under KRS 342.020, in 1971, the year of the injury, the maximum medical benefit allowable was $3,500.00. That sum has been paid by the carrier, as well as substantial voluntary additional payments for medical expenses. Under *Harlan Collieries Company v. Johnson,* supra, the carrier is not entitled to credit voluntary payments for medical treatment in excess of the statutory limit against disability benefits. Since Mr. Paulus has received the maximum allowable in medical benefits and is not seeking additional medical benefits, the only issue is whether he has received all disability benefits to which he is entitled by reason of being totally and permanently disabled. It is clear that he has not.

On February 1, 1973, when Liberty Mutual "agreed to settle all claims for its Workmen's Compensation lien for the sum of $13,333.33," it had paid Mr. Paulus only $3,920.00, or $19,800.00 less than the maximum disability benefit allowable for total permanent disability.

The total cash outlay by Liberty Mutual for which it would be entitled to recover by way of subrogation was $3,920.00 plus $3,500.00[1] or a total of $7,420.00. But Liberty Mutual settled its Workmen's Compensation lien claim for $5,913.33 in excess of its actual cash outlay to which it would be entitled to recover by subrogation. That amount, $5,913.33, was accepted by Liberty Mutual in settlement of future disability benefits payable (but unpaid) to Mr. Paulus in the amount of $19,880.00. The payment could not have been in settlement of its "excess" medical benefits paid on behalf of Mr. Paulus since such are not recoverable under KRS 342.055 as not being "payable." Either view of what that sum, ($5,913.33) represents, unerringly points to the conclusion that Mr. Paulus is entitled to recover from Liberty Mutual the sum of $19,880.00. Under the view that the sum of $5,913.33 was paid Liberty Mutual in settlement for future disability benefits payable to Mr. Paulus, it is clear that Liberty Mutual owes Mr. Paulus $19,880.00. Any other conclusion would have the effect of allowing Liberty Mutual to offset the "excess" medical payments against Mr. Paulus' entitlement to disability benefits which is contrary to the holding of *Harlan Collieries Company v. Johnson,* supra.

Suppose, for example, Liberty Mutual had paid Mr. Paulus his entire entitlement of $23,800.00, for disability benefits *before* Mr. Paulus settled his third party action for $40,050.00.

Then on February 1, 1973, Mr. Paulus would have achieved the following *gross* recovery:

---

[1] Since the judgment is silent as to medical payments, the carrier might not have been entitled to indemnity for them.

Third party judgment	$40,050.00
Workmen's Compensation disability payments made	23,800.00
Total gross recovery	$63,850.00

Since Mr. Paulus, clearly, may not recover twice for the same injury, Liberty Mutual would be entitled to recover, by way of subrogation, for the payments made by it to Mr. Paulus.

Suppose, then, at that point, Liberty Mutual settled its Workmen's Compensation lien claim in the amount of $13,333.33, (Mr. Paulus' attorney, in the third party action, of course, would be entitled to his fee), the net recovery to Mr. Paulus would be computed as follows:

Total gross recovery		$63,850.00
Less:		
Liberty Mutual's subrogation settlement	$13,333.33	
Attorney's fee (third party action)	13,383.34	
Total deductions		—26,716.67
Net to Mr. Paulus		$37,133.33

Under the present aspect of this case, Mr. Paulus has a net recovery in the amount of $17,253.33, computed as follows:

Disability benefits paid	$ 3,920.00
Recovery in the third party action	13,333.33
Total	$17,253.33

There is no reason, either legal or logical, why Mr. Paulus should recover less for his work-connected injury if he recovered a judgment in the third party action *before* he was paid all disability benefits to which he was entitled rather than after, especially where the Workmen's Compensation carrier has accepted as "settlement of all" its claims, a sum in excess of payments to him.

The difference between the net recovery to Mr. Paulus, if he obtains judgment in his third party action *after* receipt of all disability benefits to which he is entitled rather than before is computed as follows:

Net to Mr. Paulus if judgment is obtained *after* payment of *all* disability benefits	$37,133.33
Net to Mr. Paulus under present aspect of this case	17,253.33
Difference, depending on whether judgment was obtained after payment of total benefits, as opposed to present aspect of the case	$19,880.00

Liberty Mutual, having settled its subrogation claim *before* having paid Mr. Paulus all disability benefits to which he is entitled, and for an amount in excess of the total chargeable cash payments to him, the following computation is not surprising:

Difference, depending on whether judgment was obtained after payment of total benefits, as opposed to present aspect of the case	$19,880.00

Total disability benefits paid Mr. Paulus to date 3,920.00

Maximum allowable disability benefits in 1971 for total permanent disability.....$23,800.00

Liberty Mutual has therefore settled its subrogation claim for future benefits due Mr. Paulus in the amount of $19,800.00, which amount it has yet to pay him. As the Board ruled in its Opinion of June 23, 1965:

> "The carrier has taken his money, he (Mr. Paulus) has not received his compensation, and this Board has committed an obvious error." (R.A., p. 20).

KRS 342.055 provides in part:

> "*Remedies when third party is legally liable*— ... If compensation is awarded under this Chapter, either the employer or his insurance carrier, having paid the compensation *or having become liable therefor,* may recover in his or its own name or that of the injured employe from the other person in whom legal liability for damages exists, not to exceed the indemnity paid *and payable to the injured employe.*" (Emphasis added).

Liberty Mutual "having become liable" for compensation "payable" to Mr. Paulus, when it agreed to accept $5,913.33 in excess of the disability benefits paid Mr. Paulus ($3,920.00) and the chargeable medical benefits paid him ($3,500.00), it thereby bound itself to pay the balance of disability benefits to

which Mr. Paulus is entitled by reason of being totally, permanently disabled ($19,800.00).

It is not unusual for Workmen's Compensation carriers to accept the settlement of their subrogation claims in third party actions, less than the total of the actual benefits paid. This usually occurs in third party actions where the assets, including liability coverage of the third party Defendant are inadequate to pay the third party Plaintiff what his case is "worth." The third party action, here, appears to be such a case, it appearing that Mr. Paulus was earning $1,000.00 per month at the time of his permanent injury and incurred medical expenses in excess of $21,000.00, but settled the third party action for only $40,050.00. Mr. Paulus and Liberty Mutual, apparently took what they could get out of the limited assets of the third party Defendants Liberty Mutual, however, having taken more from the proceeds of the judgment in the third party action than it had paid Mr. Paulus, bound itself to pay the balance of Mr. Paulus' disability benefit entitlement ($19,800.00).

The major fallacy of Liberty Mutual's argument is its contention that the maximum total recovery by Mr. Paulus, even with the third party action, may not exceed $23,800.00. KRS 342.055 has never been construed to support that contention of Liberty Mutual. That statute merely extends to the insurance carrier a derivative claim of indemnity out of the proceeds of any judgment in a third party action for sums paid *or payable* by the carrier which claim, of course, the carrier may settle for less than the benefits paid *or payable* to the employee. *National Bis-*

cuit Co. v. Employers Mut. Liability Ins. Co., Ky., 231 SW2d 52 (1950). There is no limitation on the maximum recovery by the employee in the third party action, the only limitation being *upon the carrier* that its indemnity may not exceed the amount paid or payable to the injured employee. Since the carriers' recovery in the third party action exceeded "the indemnity paid" Mr. Paulus, the balance of the benefits are "payable."

III.

WHERE WORKMEN'S COMPENSATION CLAIMANT FILED HIS PETITION ON APPEAL IN THE CIRCUIT COURT THAT WOULD HAVE JURISDICTION TO TRY AN ACTION FOR DAMAGES IF KRS CHAPTER 342 DID NOT EXIST, WITHIN 20 DAYS AFTER THE RENDITION OF THE FINAL ORDER OF THE BOARD, STATING FULLY THE GROUNDS UPON WHICH REVIEW WAS SOUGHT, AND ASSIGNING ALL ERRORS RELIED ON, AND SUMMONS HAVING ISSUED ON THE PETITION WITHIN SUCH 20 DAYS FOR THE ADVERSE PARTY AND THE BOARD, AND THE SUMMONS HAVING BEEN PROMPTLY DELIVERED TO THE APPROPRIATE SHERIFF FOR SERVICE, ALONG WITH COSTS, THE CLAIMANT PERFECTED A TIMELY AND EFFECTIVE APPEAL.

KRS 342.285(1) prescribes *when* and *where* a petition on appeal is to be filed.

KRS 342.285(2) prescribes *what* the petition on appeal must state. Every statement required by KRS 342.285(2) was set out in the Petition on Appeal filed in this case. (R.A., p. 1).

The Appellants do not contend otherwise. What Appellants do argue is that the original Petition on Appeal did not *allege* that Mason Circuit Court ". . . would have jurisdiction to try an action for

damages for the injuries . . ." if KRS Chapter 342 did not exist. Appellants do not argue that Mason Circuit Court is the "wrong" court, merely, that Mr. Paulus did not *allege* that it was the "right" court. KRS 342.285(2) requires no such allegation.

Since the employer is a corporation, KRS 452.450 is the venue statute which specifies where tort or contract actions must be brought. The applicable provisions of that statute are as follows:

> ". . . an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed."

Mason Circuit Court is the appropriate court, under that statute whether (absent KRS Chapter 342) Mr. Paulus sued in tort or on a contract for his injuries. The burden of establishing the defense of improper venue must be sustained by the Appellants by presenting facts to show that the criteria of KRS 452.450 indicate that another county, other than Mason County, is the proper county in which to file this appeal. No such facts were presented by Appellants and no such facts exist to show that any county other than Mason is appropriate.

In *Leep v. Ky. State Police,* Ky., 340 SW2d 600 (1960) (not *the* Leep opinion, but an earlier one in the same case), this Court reversed the trial court

which had dismissed an appeal for lack of venue jurisdiction. Leep, a Kentucky State Policeman, had a work-connected injury in Hardin County. He sought review of his award in Franklin Circuit Court. The trial court dismissed his appeal on two grounds: (1) that if the Act did not exist Leep could not have brought an action against the Kentucky State Police because of governmental immunity, and (2) because he was injured other than in Franklin County.

In reversing on both points, this Court held that the appeal statute, KRS 342.285(1) must be applied without regard to whether the civil action would be successful, in order to permit circuit courts to have general jurisdiction of appeals, and further held that the proper venue lay in the county of the employer's residence or the county of the employee's injury, at the employee's election. Mason County is the county of Browning's residence, and no party contends otherwise.

Browning relies on *Thacker v. R. F. Coal Company*, Ky., 332 SW2d 532 (1960) in urging reversal. In Thacker, the offices and place of business of the employer were wholly located in Grundy and Willard Yard, Virginia. The employee was injured at Willard Yard, Virginia. Neither of the parties were operating under the Kentucky Workmen's Compensation Act. The only Kentucky connection in the case was that the employee resided in Pike County. The facts were not in dispute. This Court properly held that Pike Circuit Court was not authorized to consider the appeal. Thacker is distinguishable on its facts.

It is submitted that KRS 342.285(2) does not require that the Petition on Appeal *allege* the elements of venue. If it does, the allegations have been timely furnished the Appellants. No responsive *pleading* was filed by Appellants, therefore, Mr. Paulus may amend, "once as a matter of course" (KCR 15.01) and such "amendment relates back to the date of the original pleading." (KCR 15.03). (See R.A., p. 33.) Appellants' contentions in this regard are neither supported by law or reason. Nor is the contention of Appellants that the appeal was untimely, meritorious. Appellants rely on *Blue Grass Mining Co. v. North,* Ky., 96 SW2d 757 (1936) and *Scott Brothers Logging and Lumber Co. v. Cobb,* Ky., 465 SW2d 241 (1971).

In the North case, the appeal was taken on August 15, 1934, summons was issued and delivered to the petitioner's attorney that day. On January 25, 1935, the summons was placed in the sheriff's hands for service. The court held that the summons was not issued *in good faith* within the time within which the appeal could have been taken in view of the long delay in delivering the summons to the Sheriff.

In the Scott Brothers case, the conduct of the petitioner was such that the Board was never served, even to the time the opinion was handed down.

In Scott Brothers, Justice Reed made a distinction between this type of case, that is a statutory appeal procedure, and a statute of limitations case, the latter being identified by the Court as "a purely civil action." (465 SW2d 241, 243). The Court applied the "substantial compliance" test in looking at any claimed defect in the appeal procedure, the reasons

for the defect and its effect on litigation. In applying the substantial compliance test in the Scott Brothers, the Court found that since there was a complete absence of service of summons on the Board, at any time, the Petitioner was guilty of *non*-compliance. The failure of the Petitioner there to comply with the requirements of KRS 342.285 had the result that the Director of the Board was never served and, consequently, had neither responded, nor filed the record of the Board's proceedings as required by the statute. Here, the Respondent-Employer and the Respondent-Insurance Carrier entered their appearances 3 days after the time for filing the Petition on Appeal had expired and the other Respondent, Workmen's Compensation Board, entered its appearance, did not object to process but requested the Court to remand this matter to it for further proceedings. The only delay here was due to the health problems of the original Circuit Judge and the family relationship of the Circuit Judge pro tem to Counsel for the Respondents-Employer and Insurance Carrier. (R.A., pp. 42-43).

In *Commonwealth Department of Highways v. Parker,* Ky., 394 SW2d 899 (1965), Respondent-Workmen's Compensation Board was not served with process until after the time had expired within which a Petition on Appeal could have been filed. The Board was served with an alias summons. The Court of Appeals ruled that it was error for the trial court to dismiss the appeal in that there was no showing of any "bad faith" upon the part of the Appellant. The Court further held that *North,* supra, relied on by the trial court, was distinguishable on its facts

and was not controlling. The Court also held at page 900:

> "It is significant that the Board does not raise any question as to the adequacy of service."

The compliance of Mr. Paulus, here, was "strict" compliance with KRS 342.285(2). According to the affidavit of the Deputy Clerk, summonses for all parties were issued on June 25, 1975. (Browning was served that day.) (R.A., p. 25). As soon as they were received by counsel for Mr. Paulus, the same were forwarded to the appropriate sheriffs for service. (R.A., pp. 36-38).

Even if the "good faith—bad faith" test obtained in Workmen's Compensation appeal cases, which apparently it does not under the *Scott Brothers* opinion, there is a total absence of "bad faith," and a total absence of a *showing* of "bad faith" in this matter.

In *Roehrig Merchant's and Businessmen's Mutual Insurance Co.*, Ky., 391 SW2d 369 (1965), a statute of limitations case, in reversing a trial court's dismissal of the action, the Court undertook to define "good faith." In doing so, at page 370, it held:

> "It can be, and usually is, something less than perfection or complete accuracy. Above all, it means not to take advantage of, not to deceive, not to be underhanded. Black's Law Dictionary states on this point: 'Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information, notice, or belief of facts which would render the transaction unconscientious.'"

There is no showing or claim by Appellants of any "bad faith" on the part of Mr. Paulus, the only claim being that the insurance carrier and the Board were *served,* just after the time within which the Petition must have been filed. The Board does not complain of service and it is questionable whether it was even necessary to serve Liberty Mutual, since service on Browning was, in effect, service upon the carrier.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED that this Court ought to affirm the order remanding Mr. Paulus' claim to the Board, as the Board has requested to correct its admitted error.

Respectfully submitted,

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